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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI ADOPT AND APPLY THE INCORRECT DEFINITION OF "BONA FIDE DISPUTE" AS USED IN SECTION 303 OF THE BANKRUPTCY CODE AND AS A RESULT WRONGFULLY GRANT RESPONDENTS' PETITION FOR INVOLUNTARY BANKRUPTCY?

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In re Rimell, 121 B.R. 253 (E.D. Mo. 1990).

In re Rimell, 946 F. 2d 1363 (8th Cir. 1991).

JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Eighth Circuit in this case filed October 15, 1991. The Eighth Circuit's decision affirmed the Order of the United States District Court, Eastern District of Missouri, Eastern Division filed November 15, 1990. The District Court's Order affirmed the Judgment and Order of the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division entered on February 5, 1990 and the Court's order of March 7, 1990.

On February 25, 1992, this Court issued an Order granting petitioners an extension of time until April 1, 1992 to file with this Court a petition for a writ of certiorari.

Jurisdiction is conferred on this Court under Article 28, Section 1254(1) of the United States Code.

STATUTE INVOLVED

Title 11, Section 303 of the United States Code (Bankruptcy Code)

Section 303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $45,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

(3) if such person is a partnership--

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

I. Facts Leading Up to the Involuntary Bankruptcy Petition.

Throughout the 1980s Albert and Harriet Rimell along with several of their associates operated business entities involved in real estate investment. Pursuant to this activity, several banks extended loans to these various entities. All of the loans were personally guaranteed by various combinations of the alleged debtors. Each of these loans consisted of a one year renewable note secured by the property into which the funds were invested.

In order for Mr. and Mrs. Rimell and their associates to continue to operate their investment companies it was essential that the banks renew or extend the terms of the loans on a yearly basis. Indeed, for several years the banks continued to extend the terms of the loans as each came due.

In 1988, two of the banks, Mercantile Bank and Boatmen's Bank, demanded payment on several of the notes and proceeded to bring civil suits on these notes in the Circuit Court for the County of St. Louis, State of Missouri. In response, the alleged debtors denied liability on the grounds that the banks had made express oral promises to renew the notes until the property was sold and further that through a course of dealing the banks had implicitly promised to extend the terms of the notes.

Prior to filing the petition for involuntary bankruptcy, Mercantile Bank moved for summary judgments on several of the notes, but the state court denied the motions. See, Appendix ("App.") at A-81 - A-83 for copies of these rulings.

Shortly after the Bankruptcy Court issued its order for relief in this case, Boatmen's Bank moved the state court for

summary judgment in the suit on the notes. This motion was denied as well. App. at A-84.

II. Bankruptcy Court Proceedings.

On October 18, 1989, four banks, Mark Twain Bank, First Bank, Boatmen's National Bank of St. Louis and Mercantile Bank National Association filed, pursuant to 11 U.S.C. Section 303(b)(2), an involuntary Chapter 7 petition in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division against Mr. Rimell and three of his associates. That same day, two banks, Mark Twain Bank and First Bank filed an involuntary Chapter 7 petition in the same court against Mrs. Rimell. The Court took jurisdiction over the subject matter of the proceedings pursuant to 28 U.S.C. Sections 151, 157, 1334 and Local Rule 29.

The alleged debtors raised several defenses to the petitions, including the

defense that the creditors did not have standing under Section 303 of the Bankruptcy Code because there existed a bona fide dispute as to each of their claims. Specifically, the alleged debtors offered the same defenses that had successfully defeated the summary judgment motion in the state court - that the banks had agreed to renew the notes both through express oral agreements and through course of dealing.

Mrs. Rimell also presented the separate defense that she had more than eleven creditors, and since Section 303(b)(2) permits two petitioning creditors to prevail only when a debtor has fewer than eleven creditors, the petition should be denied.

At trial, Mr. Rimell testified that he and representatives of the banks had made explicit oral agreements that the banks would renew the notes as they came due. Further, the alleged debtors presented evidence as to

the prior course of dealings with the banks regarding renewal of the notes, which indicated that the banks would continue to deal with the alleged debtors as they had in the past. See, In re Rimell, 111 B.R. 250, 258-259 (Bankr. E.D. Mo. 1990); App. A-31 - A-37.

As to her separate defense Mrs. Rimell presented at trial evidence indicating that she had twenty two creditors at the time the petition had been filed.

The Bankruptcy Court entered its Memorandum Opinion and Order on February 5, 1990. In re Rimell, 111 B.R. 250; App. A-1. In its opinion the court granted relief against the alleged debtors. The court stated that there was no evidence to confirm Mr. Rimell's testimony regarding the oral agreements to extend the terms of the notes as each of the bank's denied that it had made such oral agreements. Rimell, 111 B.R. at

258; App. at A-35. Further, the court decided that each of the previous extensions of the terms of the notes had been a separate transaction creating a new loan each time. As a result, there could not be a course of dealing established. Rimell, 111 B.R. at 259; App. at A-37.

Thus, the court found that "the parties did not, either orally or through prior course of dealing, agree to alter, extend, or modify . . ." the loans. Id.

The Bankruptcy Court also found that Mrs. Rimell had only six creditors at the time the petition was filed, and thus, two petitioning creditors were sufficient under Section 303(b)(2) of the Code. Rimell, 111 B.R. at 257; App. at A-29.

On March 7, 1990, the Bankruptcy Court entered its Memorandum Opinion and Order denying Mr. and Mrs. Rimell's Motion to Set

Aside and Vacate the Memorandum, Order and Opinion Entered February 5, 1990. App. A-39.

III. Appellate Court Proceedings.

Mr. and Mrs. Rimell appealed the Bankruptcy Court's decision to the United States District Court for the Eastern District of Missouri, Eastern Division on the bona fide dispute issue and the number of creditors issue. While the appeal was pending, a third bank, Pioneer Bank, moved the Bankruptcy Court to join as a petitioning creditor as to Mrs. Rimell. Although Section 303 (c) of the Bankruptcy Code specifically requires that a joining petitioner must move to join prior to the ordering of relief by the Bankruptcy Court, the court allowed Pioneer bank to join as a petitioning creditor. As a result, the District Court found the issue as to the number of Mrs. Rimell's creditors to be moot. In re Rimell, 121 B.R. 253, 257 (E.D. Mo. 1990); App. A-53,

A-65. Nevertheless, the District Court upheld the Bankruptcy Court's findings as to the number of creditors Mrs. Rimell had. Id.

Moreover, the District Court affirmed the Bankruptcy Court's decision on the issue of whether a bona fide dispute existed as to the creditors' claims. Rimell, 121 B.R. at 256; App. at A-63.

The Rimells appealed to the United States Court of Appeals for the Eighth Circuit on all issues. On October 15, 1991, the Eighth Circuit affirmed the District Court's decision. In re Rimell, 946 F.2d 1363; App. A-67. It found that no "bona fide dispute" existed. Rimell, 946 F.2d at 1366; App. at A-76. Further, it found that the issue of the number of Mrs. Rimell's creditors was moot because of the addition of the third petitioning creditor. In passing, the court mentioned that it found no error in

the Bankruptcy Court's method of counting Mrs. Rimell's creditors. Id.

Mr. and Mrs. Rimell now petition this Court to issue a writ of certiorari to the Eighth Circuit Court of Appeals and to review the Eighth Circuit's decision in this case.

ARGUMENT

I. Introduction.

Congress amended the Bankruptcy Code in 1984 so that only a creditor with a claim not subject to a "bona fide dispute" could join in instituting an involuntary bankruptcy proceeding. The goal of this legislation was to preclude a creditor from wielding the threat of bankruptcy as a "club" to coerce an alleged debtor into forfeiting his legitimate and good faith disputes as to his liability.

Unfortunately, Congress did not supply a definition of "bona fide dispute," resulting in differing and conflicting definitions in the various jurisdictions. However, under virtually all of the definitions supplied to date, bankruptcy courts are not to determine the outcome or even the likely outcome of the "bona fide dispute," but merely whether such a dispute exists. If a "bona fide dispute"

exists, it is left to the state court to determine the outcome.

In this case, the Bankruptcy Court reached conclusions of law and fact as to the outcome of the alleged debtors' dispute over their liability on the creditors' claims. Based on this determination, the Bankruptcy Court found that a "bona fide dispute" did not exist. This methodology circumvents congressional intent and conflicts with the decisions of each of the Circuit Courts which have addressed this issue.

II. History of the 1984 Amendments.

Under the Bankruptcy Code of 1898, a creditor generally could not qualify as a petitioning creditor in an involuntary bankruptcy where there was a dispute as to the creditor's claim against the debtor.

Section 59b of the 1898 Act provided that "[t]hree or more creditors who have

provable claims not contingent as to liability . . . may file a petition. . . ."

For a claim to be "provable" it had to be "alive [and] potentially enforceable. . . ." 1 H. Remington, a Treatise on the Bankruptcy Law of the United States 308-9 (1950). Thus, holders of disputed claims were generally prevented from becoming petitioners in an involuntary bankruptcy. In re All Media Properties, Inc., 5 B.R. 126, 133 (S.D.Tex 1980).

In 1978, Congress amended the requirements under the Act so that courts found that even holders of disputed claims could often become petitioning creditors. The courts looked to Section 303(b)(1) and Section 101(4) to reach this conclusion. Section 303(b)(1) gave any holder of a claim that was not contingent as to liability the right to be a petitioning creditor.

Section 101(4) defined "claim" as:

> [A] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. . . .

Thus, holders of disputed claims often were allowed to be petitioning creditors. In re Dill, 731 F.2d 629 (9th Cir. 1984); In re B.D. International Discount Corp., 701 F.2d 1071 (2nd Cir. 1983); cert. denied, 464 U.S. 830, 104 S.Ct. 108; Matter of Covey, 650 F.2d 877 (7th Cir. 1981).

Allowing holders of disputed claims to force alleged debtors into bankruptcy allowed creditors to use the threat of bankruptcy as leverage to force alleged debtors to forsake their defenses and pay creditors even where there was a good faith dispute as to liability. In response to this patently inequitable status of the law, Congress waited only six years before again amending

Section 303 of the Code through the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Thus, Section 303 of the Bankruptcy Code now provides that an involuntary case can only be commenced by the filing of a petition

> by three or more entities, each of which is . . . a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute. . . .

(emphasis added).

In proposing this amendment, Senator Max Baccus of Montana indicated that the amendment was intended to protect debtors by forcing creditors to utilize state courts to attempt to collect disputed debts. The following is a rather long but extremely telling excerpt from a statement by Senator Baccus:

> The problem can be explained simply. Some courts have interpreted Section 303's language on a debtor's general failure to

pay debts as allowing the filing of involuntary petitions and the granting of involuntary relief even when the debtor's reason for not paying is a legitimate and good faith dispute over his or her liability. This interpretation allows creditors to use the Bankruptcy Code as a club against debtors who have bona fide questions about their liability but who would rather pay up than suffer the stigma of involuntary bankruptcy proceedings.
My amendment would correct this problem. Under my amendment, the original filing of an involuntary petition could not be based on debts that are the subject of a good-faith dispute between the debtor and his or creditors. In the same vein, the granting of an order of relief could not be premised solely on the failure of a debtor to pay debts that were legitimately contested as to liability or amount. I believe this amendment although a simply (sic) one is necessary to protect the rights of debtors and to prevent misuse of the bankruptcy system as a tool of coercion. I also believe it corrects a judicial misinterpretation of existing law and congressional intent as to the proper basis for granting involuntary relief.

130 Con. Rec. S 7618, (98th Cong. 2d Sess., June 19, 1984) (emphasis added).

As amended, the Code is intended to prevent creditors from utilizing the bankruptcy courts to enforce disputed claims. Instead, creditors must resort to state courts for a determination of such issues.

Unfortunately, when Senator Baccus proposed his amendment he failed to provide us with a definition of the term "bona fide dispute." Since 1984, bankruptcy courts have grappled with this problem, coming up with varying definitions for the term, none of which is sufficiently definite to be uniformly applied to the myriad "disputed" claims which are dealt with in bankruptcy proceedings. To date, different courts have come up with at least five different definitions of "bona fide dispute."[1] This

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[1] See 2 Collier's on Bankruptcy, para. 303.08; In re Johnston Hawks, LTD., 49 B.R. 823 (Bankr. D. Ha. 1985); In re Stroop, 51 B.R. 210 (Bankr. D. Colo. 1985); In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986); In re Ross, 63 B.R. 951 (Bankr. S.D.N.Y.

Court now has before it the opportunity to clear up the confusion surrounding the definition of "bona fide" dispute and bring uniformity to the application of Section 303.

III. The Objective and Subjective Definition of "Bona Fide Dispute."

The Bankruptcy Court for the District of Hawaii was one of the first to address the definition of "bona fide dispute" when it decided In re Johnston Hawks, Ltd., 49 B.R. 823 (Bankr. Ct. D. Ha. 1985). The court defined "bona fide dispute" as

> a conflict in which an assertion of a claim or right made in good faith and without fraud or deceit on one side is met by contrary claims or allegations made in good faith and without fraud or deceit on the other side.

Id. at 830.

The court then went on to list four factors which it would analyze in determining

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1986); In re Hope Communication, Inc., 59 B.R. 939 (Bankr. W.D. La. 1986).

whether claims were subject to a bona fide dispute.

> 1. The nature of the dispute.
>
> 2. The nature of the extent of the evidence and allegations presented in support of the creditor's claim and in support of the debtor's contrary claims.
>
> 3. Whether the creditor's claim and the debtor's contrary claims are made in good faith and without fraud or deceit.
>
> 4. Whether on balance the interests of the creditor outweighs (sic) those of the debtor.

Id. at 831.

This is both an objective and a subjective analysis, looking toward the validity of the claims involved, the good faith intentions of the parties and the interests of the parties. The roots of this analysis lie in pre-1984 case law.[2]

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[2] These include: In Matter of Covey, 650 F.2d 877 (7th Cir. 1981) where the court held that a disputed debt should be excluded where: 1. the dispute was whether any claim

The main criticism of this approach is on its subjective side. By examining whether the creditor's and debtor's conflicting claims are in good faith and without fraud or deceit, the court allows parties who believe in good faith in their bad claims to prevail. In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986). This would seem to reward ignorance.

On the other hand, by determining whether on balance the creditor's interests outweigh the debtor's, a court is able to examine whether a creditor will be prejudiced by being forced to resort to a state court to litigate his claim. If a creditor will not

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existed, not merely regarding the amount of the claim; 2. the dispute could be examined without substantial litigation of legal or factual questions; and 3. the interest of the debtor in defeating an order of involuntary bankruptcy outweighed creditors' interests in achieving a somewhat more rapid determination of the involuntary; and In re Dill, 731 F.2d 629 (9th Cir. 1984) where the court utilized a simple balancing test balancing the interests of the creditor against those of the debtor. Johnston Hawks, 49 B.R. at 830.

be prejudiced by litigating in state court then it is more likely that the bankruptcy proceeding was utilized by the creditor as a weapon to force the alleged debtor to forego his defenses and pay his disputed debt. Preventing a creditor from exerting such pressure would seem to further the purpose of the 1984 amendments as articulated by Senator Baccus.

Interestingly, the court in In re Lough argues that it is improper to give consideration to the balance of interests as between the creditor and the debtor as there is no basis for it in the statute as amended. Id. at 996. However, this seems to ignore the very purpose for which the Act was amended - to allow the creditor to protect his interests through the use of the Bankruptcy Court without allowing him to utilize the court as a means of coercion. Hence, a determination as to what degree it

is essential in a particular case that a creditor have access to the Bankruptcy Court would seem a worthy endeavor.

IV. The Summary Judgment Definition of "Bona Fide Dispute."

Within months after the Bankruptcy Court in Hawaii issued its subjective and objective definition of "bona fide dispute" in Johnston Hawkes, the Bankruptcy Court in Colorado, in In re Stroop, 51 B.R. 210 (D. Col. 1985) came up with a completely objective definition. The court, providing no reasoning for its decision, concluded that, when determining whether a claim was subject to a bona fide dispute, it would be appropriate to apply the same standard applicable to motions for summary judgment:

> If the defense of the alleged debtor to the claim of the petitioning creditor raises material issues of fact or law so that a summary judgment could not be rendered as a matter of law in favor of the creditor on a trial of

> the claim, the claim is subject to a bona fide dispute.

Id. at 212.

This standard is not without its critics. The court in In re Lough, 57 B.R. 993 pointed out that under the summary judgment test, if there is a substantial dispute as to the proper application of law but no substantial issue of fact, Stroop might require the court to resolve the question of law as if on a motion for summary judgment and simply determine whether the alleged debtor is liable to the creditor. Id. at 997. This conflicts with Congressional intent because it requires the court to make a determination of the merits of the alleged debtor's defense and not simply whether a bona fide dispute exists. Id. As the Lough court states, "The legislative history makes it clear that Congress intended to disqualify a creditor

whenever there is any legitimate basis for the debtor not paying the debt, whether that basis is factual or legal." Id. at 997.

V. The Modified Summary Judgment Definition of "Bona Fide Dispute."

Less than a year after the Stroop decision, the Bankruptcy Court in the Eastern District of Michigan came up with yet another definition of "bona fide dispute." Criticizing the Johnston Hawks and Stroop decisions as discussed above, the court came up with a new standard:

> [I]f there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed.

Lough, at 997.

The court emphasized that "in deciding whether there is a bona fide dispute, it must not resolve any genuine issues of fact or law." Id.

This formulation would seem to be the same summary judgment standard of Stroop liberalized in favor of alleged debtors so as to ensure that courts do not issue rulings of law as to the debtor's defenses.

The Seventh Circuit Court of Appeals adopted the Lough approach in In re Busick, 831 F.2d 745 (7th Cir. 1987) stating:

> Under this standard, the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. However, the "[t]he statute does not require the court to determine the outcome of any dispute, only its presence or absence. Only a limited analysis of the claims at issue is necessary."

Id. at 750 (emphasis added).

VI. The "Glossed" Modified Summary Judgment Definition of "Bona Fide Dispute."

The standard enunciated in Lough and followed in Busick was adopted in the Third Circuit in B.D.W. Associates, Inc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65

(3rd Cir. 1989). However, the court in B.D.W. misread the Busick decision and as a result added a "gloss" to the Lough and Busick standards which significantly altered the definition in favor of creditors. The court misquoted Busick as stating that substantial factual and legal questions had to be raised by the debtor to preclude a finding of involuntary bankruptcy. B.D.W. at 66-67. However, in reality what the court in Busick had done was, when applying the "bona fide dispute" standard to the facts of its case, quoted the trial court as having found that the debtor had raised "substantial legal questions regarding each of the creditors' claims" thus proving the existence of a bona fide dispute. Busick at 750. The Seventh Circuit was not indicating that the debtor had to prove the existence of "substantial legal and factual questions" regarding the creditor's claim in order to show the

existence of a bona fide dispute, but merely that in that particular case the debtor had raised such questions and so therefore clearly had shown that a bona fide dispute existed. Certainly, there is no indication that the court in Busick intended to add a "gloss" to the Lough formulation.

Still, the Third Circuit, by adding its "gloss" requiring that a debtor show "substantial" factual and legal questions, increased the debtor's burden.

VII. The Eighth Circuit has Professed to have Adopted the "Glossed" Modified Summary Judgment Definition of "Bona Fide Dispute" but Actually has Adopted a Definition That Requires a Determination of the Disputed Claim.

The Eighth Circuit in this, its first case dealing with the definition of "bona fide dispute," has professed to have adopted the Third Circuit's "glossed" version of the standard enunciated in Lough and Busick. Indeed, the Bankruptcy Court also professed

to have applied the Lough standard. Yet, it is evident that when the Bankruptcy Court went through the process of determining whether a bona fide dispute existed in this case, it did not apply the Lough standard. Moreover, it is clear from the Circuit Court's discussion of its reasons for affirming the trial court's decision, that, although it has professed to have adopted the Lough standard, it actually has adopted a much more stringent one.

A. The Bankruptcy Court Did Not Merely Determine If a Bona Fide Dispute Existed But Instead Reached Conclusions of Law and Fact as to the Validity of the Alleged Debtors' Defenses to the Creditors' Claims.

Mr. and Mrs. Rimell and three of their associates in the real estate investment business were forced into involuntary bankruptcy by four creditor banks who had made loans to various entities with which the alleged debtors were associated. Each of the

loans was personally guaranteed by various combinations of the debtors. The loans were one year renewable notes secured by the real estate into which the funds were invested. Obviously, to be viable, it was essential that the banks renew or extend the terms of the loans every year in order to keep the business afloat.

Although the creditor banks extended or renewed many of the loans several times, at some point they decided to demand payment in full on them. In fact, two of the creditor banks, Mercantile Bank and Boatmen's Bank, filed suits in state court to collect on several of the notes. However, instead of attempting to follow through with their efforts to sue on the notes in state court, the creditor banks, on October 18, 1989, filed a petition in the Bankruptcy Court for the Eastern District of Missouri, Eastern

Division to force Mr. and Mrs. Rimell and their associates into involuntary bankruptcy.

In both the state court action and the bankruptcy court action, the alleged debtors put forth the same defense - that the banks, through course of dealing and express oral agreement, had agreed to continue extending the terms of the loans until the property was sold. Indeed, the state court was sufficiently satisfied with the evidence presented by Mr. Rimell and his associates as to this defense that it refused to grant Mercantile Bank summary judgments on its claims.

In the bankruptcy action, Mr. and Mrs. Rimell and the other alleged debtors objected to the bank creditors' standing on the basis that a bona fide dispute existed as to the banks' claims. The alleged debtors presented evidence of the state court's rejection of Mercantile Bank's motions for summary

judgment, Mr. Rimell's testimony as to the creditors' express oral agreements and evidence of the banks' past histories of renewing the loans creating a course of dealing. The Bankruptcy Court, without indicating which definition of "bona fide dispute" it was applying, ruled against the alleged debtors and found that no bona fide dispute existed.

As to the alleged debtors' claims that the banks had made express oral agreements to renew the loans, the Bankruptcy Court preferred to believe the testimony of the banks' representatives over that of Mr. Rimell.

> Albert Rimell testified that each Creditor orally agreed, at the time of the loan transaction, that it would extend the terms of the loan, lower the rate of interest, or amend the loan with terms more favorable to the alleged Debtors . . . [T]here is no evidence to

> confirm that the parties ever agreed to such terms.

Rimell, 111 B.R. at 258, App. A-35.

As to the course of dealing argument, the Bankruptcy Court found that each of the loan renewals created a new loan transaction and thus there could be no course of dealing established by such independent transactions. Rimell, 111 B.R. at 259; App. at A-37.

In conclusion, the Bankruptcy Court stated:

> [T]he parties did not, either orally or through prior course of dealing, agree to alter, extend or modify the existing written contractual terms on any of the loans in the instant case. Given that the parties did not agree to such terms, it follows that there could be no bona fide dispute.

Id.

Clearly, in order to reach its decision, the Bankruptcy Court found it appropriate to reach conclusions of fact and law - who to believe and who not to believe - what

constitutes a course of dealing and what does not.

If the Bankruptcy Court had been applying the Lough standard, it would never have reached this determination. It is clear that under Lough, it is a bankruptcy court's role to determine whether a "bona fide dispute" exists, not what the outcome or likely outcome of such a dispute will be.

In its subsequent denial of Mr. and Mrs. Rimell's Motion to Set Aside and Vacate, the Bankruptcy Court for the first time professed to have applied the Lough modified summary judgment definition of "bona fide dispute."

Although specifically recognizing that under Lough it was required only to determine whether a bona fide dispute existed, the Bankruptcy Court nevertheless once again made a determination as to the outcome of the dispute.

The Bankruptcy Court stated:

> Upon reviewing the evidence, this Court cannot determine, using an objective standard, that a bona fide dispute existed because neither the newly submitted evidence nor any of the Debtors' evidence proves the existence of an agreement to renew or modify the terms of the loans between the parties.

A-50 - A-51 (emphasis added).

The key word here is "proves." The Bankruptcy Court placed a burden on the alleged debtors to "prove" the existence of an agreement to renew or modify the terms of the loans. But this is much too stringent of a standard. The alleged debtors should merely have been required to show that there existed a bona fide dispute as to whether an agreement to renew or modify the loans was reached, not that there was such an agreement. Submitting evidence indicating that such agreements existed should have been sufficient.

In reviewing the Bankruptcy Court's decision, the District Court for the Eastern District of Missouri, Eastern Division, also professed to have adopted the Lough standard. Citing Busick, the District Court stated that "the Bankruptcy Court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt." Rimell, 121 B.R. at 256; App. at A-63 (emphasis in original).

The District Court pointed out that the Bankruptcy Court had found that there had been no oral agreement or course of dealing and thus affirmed the Bankruptcy Court's decision.

B. The Eighth Circuit Has Adopted a Definition of "Bona Fide Dispute" That Requires the Bankruptcy Court to Determine the Validity of an Alleged Debtor's Defenses Rather Than Merely Determining If a Bona Fide Dispute Exists.

The Eighth Circuit Court of Appeals, in affirming the District Court's decision, also

professed to have adopted the Lough definition of "bona fide dispute" as "glossed" by Busick. In articulating the definition of "bona fide dispute" to be applied in the Eighth Circuit the court stated:

> This does not mean that the bankruptcy court is totally prohibited from addressing the legal merits of the alleged dispute; indeed, the bankruptcy court may be required to conduct a limited analysis of the legal issues in order to ascertain whether an objective legal basis for the dispute exists. Busick, 831 F.2d at 750. Finally, because the determination as to whether a dispute is bona fide will often depend (as it did in this case) upon an assessment of witnesses' credibilities and other factual considerations, the bankruptcy court's determination in this regard is a factual finding. . . .

Rimell, 946 F.2d at 1365; App. at A-74 (emphasis added).

Petitioners do not propose that the determination of the existence of a bona fide

dispute should be a conclusion of law. However, the "factual finding" should be confined to a determination by the court as to whether a bona fide dispute exists, not the likely outcome of the dispute. The "limited analysis of the legal issues" should be limited to an analysis of whether there is a dispute as to the legal ramifications of the facts presented, not what the law on the disputed subject is.

There is a clear implication in this portion of the Eighth Circuit's opinion that the Bankruptcy Court is obligated to weigh the evidence, including the credibility of witnesses, review the law, and then reach a conclusion of law and fact as to the likely result of the dispute. In reality neither conclusions of law nor fact should be reached or even approached. Analyzing issues of law and fact in this case was the equivalent of

resolving the dispute.

Indeed, the Court of Appeals affirmed the Bankruptcy Court's decision citing the Bankruptcy Court's conclusion that "the parties did not . . . extend or modify the existing written contractual terms on any of the loans. . . . Rimell, at 1366, App. at A-75, A-76.

It is precisely this type of conclusory finding of fact that is prohibited under any definition of "bona fide dispute."

Whatever definition of "bona fide dispute" is applied to the present case - whether it be the Stroop summary judgment standard, the Lough modified summary judgment standard, or even the "glossed" modified summary judgment standard - it is clear that a bona fide dispute existed.

A Missouri state court had already denied summary judgments to Mercantile Bank in its attempt to collect on loans parallel

to the ones at issue here. Moreover, Mr. Rimell testified at trial that the banks had agreed to extend the loans. If the Bankruptcy Court had applied the Stroop standard, this evidence should have been sufficient to show that a bona fide dispute existed.[3] The Lough standard is almost identical to the Stroop standard except that on issues of law it is more helpful to the alleged debtor. Thus, if the Bankruptcy Court had applied the Lough standard correctly, it should have found that a bona fide dispute existed as to whether there existed agreements to renew the loans. Instead, the Bankruptcy Court reached

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[3] Indeed, one of the creditors, Boatman's National Bank of St. Louis, subsequent to the Bankruptcy Court's entry of relief, was denied in its motion for summary judgment on one of the debts that was the subject of the original Petition. See App. at A-84.

its own conclusions of law and fact as to the validity of the creditors' claims, in effect resolving the dispute in favor of the creditors.

Thus, the Eighth Circuit by affirming the trial court allowed to happen exactly what Senator Baccus was attempting to prevent when he proposed the 1984 amendments to Section 303 of the Bankruptcy Code. The creditor banks, realizing that they could not win summary judgment in state court, utilized the Bankruptcy Court as a shortcut to their goal. The creditor banks ran to the Bankruptcy Court for relief, where they found a court more cooperatively willing to make determinations of fact and law as to the validity of the banks' claims.

If the Eighth Circuit's interpretation of the Lough standard is allowed to stand, more and more creditors will be running to

the friendly confines of federal bankruptcy court in order to enforce their claims. The coercion that Senator Baccus attempted to prevent will creep back into the Bankruptcy Code.

Only by adopting a strict version of the Lough modified summary judgment definition of "bona fide dispute" can this Court enforce Congressional intent and protect alleged debtors from the strong arm tactics of overreaching creditors.

CONCLUSION

For these various reasons, Petitioners respectfully request that this Petition for Writ of Certiorari be granted, and this case be set for argument to determine if this

Court should reverse the Bankruptcy Court's decision.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 1 1992
OFFICE OF THE CLERK

91-1584

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
ALBERT RIMELL,	)	Case No. 89-04383-BSS
HARRIET RIMELL,	)	Case No. 89-04382-BSS
MORRIS SHERMAN,	)	Case No. 89-04385-BSS
ROSALYN MARGULIS,	)	Case No. 89-04386-BSS
Lawrence Margulis,	)	Case No. 89-04387-BSS
	)	
Alleged Debtors	)	Entered February 5, 1990

MEMORANDUM OPINION AND ORDER

INTRODUCTION

On October 18, 1989, petitioners, Mark Twain Bank (hereinafter "Mark Twain") and First Bank filed, pursuant to 11 U.S.C. section 303(b) (2), an involuntary Chapter 7 petition against Alleged Debtor Harriet Rimell. This filing was one of a series of actions in which Mark Twain and First Bank, in addition to The Boatmen's National Bank of St. Louis (hereinafter "Boatmen's), and Mercantile Bank of St. Louis National Association f/k/a Mercantile Bank National Association (hereinafter "Mercantile" and collectively as "the Creditors"), filed involuntary Chapter 7

petitions against Albert Rimell, Morris Sherman, Rosalyn Margulis, and Lawrence Margulis, pursuant to 11 U.S.C. section 303(b) (1). Harriet Rimell asserts that she has more than eleven creditors, and since section 303(b) (2) permits two petitioning creditors to prevail only when a debtor has fewer than eleven creditors, the petition must be denied.

While Harriet Rimell's case shares defenses common to the other four debtors listed above, the issue of whether sufficient creditors exist to avoid her being placed in an involuntary Chapter 7 bankruptcy is unique to her case. Thus, this opinion will be divided into two main sections-- Ms. Rimell's section 303(b) (2) counting of creditors, and the overriding involuntary case involving all five defendants.

JURISDICTION

This Court has jurisdiction over the subject matter of the proceeding pursuant to 28 U.S.C. sections 151, 157, 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" which the Court may hear and determine pursuant to 28 U.S.C. section 157(2) (O).

I.

Ms. Rimell's section 303(b) (2) Creditor Counting

FACTS

In her answer, Harriet Rimell listed seventeen (17) creditors of her estate. Late in the afternoon of the day before this case went to trail, counsel for Ms. Rimell filed an amendment to this list (as required by Rule 1003(b) which enumerated four additional creditors. At the commencement of the trial, this Court denied Ms. Rimell's Motion to

Amend Pleadings as untimely and prejudicial to the rights of the petitioning creditors to seek discovery and joinder of such creditors. Between December 18 and January 3, 1990 (the date of resumption of the December 18, 1989 trial), this Court permitted Ms. Rimell to add five creditors to those already claimed in her answer. However, this Court denied her attempted addition during the continued trial of the St. Louis County Collector as a twenty-third creditor. Thus, Ms. Rimell has listed a total of twenty-two creditors which this Court must consider in determining whether the Plaintiffs have met their burden.

At trial, Harriet Rimell testified that in January or February, 1989 she and her husband, Albert Rimell, created the Rimell Family Trust (hereinafter the "Trust") to pay all bills related to expenses and maintenance of the Rimell's pleadings were paid directly from the Trust, whose sole source of funds,

Ms. Rimell testified, was her regularly-contributed paychecks. Ms. Rimell also testified that the Trust was created solely "for estate planning purposes".

Ms. Rimell has listed creditors of both herself and the Trust. Thus, in order to determine the number of creditors she has for purposes of section 303(b) (2), this portion of the Opinion will be divided into two sections-- creditors of Ms. Rimell personally, and creditors of the Trust.

A. Creditors of Ms. Rimell

1. Sears, Roebuck and Company

Ms. Rimell listed Sears, Roebuck and Company (hereinafter "Sears") as holding a $426.92 claim for merchandise purchased. In 1962, Mr. Rimell opened a Sears account under the name of "Albert Rimell", with Harriet Rimell as an authorized signatory. Thus, while Harriet Rimell was capable of purchasing merchandise under this account, at

no time has Sears held her personally liable for any debt incurred.

Section 101(4) of the Bankruptcy Code defines a "claim" as a "right to payment". In order for the creditor to have a right to payment, the debtor must be personally liable. Although Teresa Nadolski, a bankruptcy representative from Sears, testified that the company may choose to "go after" Ms. Rimell if her husband was unable to pay his bill, this Court was not presented with evidence sufficient to allow a conclusion that Ms. Rimell was personally liable. Given the absence of Ms. Rimell's personal liability, this Court concludes that Sears does not have a claim against Ms. Rimell and thus may not be counted as a creditor for purposed of section 303(b) (2) of the Bankruptcy Code.

2. Pioneer Bank

Pioneer Bank's involvement with the Rimells arose from a $1,225,846.61 commercial loan which it made to Albert Rimell, Inc. On February 17, 1988, Harriet Rimell executed a personal guaranty of the indebtedness. Under the terms of the guaranty, Pioneer reserved the right, whenever the loan came due, to require Ms. Rimell to pay the amount due on demand. At trial Jean Marcus, Pioneer's Vice President of Real Estate Lending, testified that although the loan was past due as of the filing date, Pioneer had not demanded payment of the loan pursuant to her personal guaranty. Thus, as of the filing date Pioneer Bank held a contingent claim against Ms. Rimell and this Court will count the Pioneer Bank as a creditor for purposes of section 303(b) (2).

3. R.B. Platt Development Co.

R.B. Platt Development Company (hereinafter "Platt") holds a claim of

$659.43 for installation of windows in the Rimell family home. On January 3, 1990, Max Platzelman, president of Platt, testified that his workmen installed the windows sometime in October, but was unable to find an exact date. The only existing written evidence of indebtedness was a letter dated December 14, 1989, in which Albert Rimell requested a bill from Platt, and a November 26, 1989 invoice from Platt.

Although Mr. Platzelman's testimony fails to conclusively prove that Platt had a claim against Ms. Rimell on the date of her filing, this Court believes that Ms. Rimell's testimony is dispositive in determining whether such a claim did exist before October 18, 1989. At trial Ms. Rimell stated that sometime in July she requested that Platt perform the work Platt agreed to this arrangement. Therefore in July 1989 a contract existed between Platt and Ms. Rimell

for which Ms. Rimell was personally liable. Given this liability, this Court holds that, for purposes of section 303(b) of the Bankruptcy Code, a party becomes a creditor at the time a debt is incurred, as in the instant case when an enforceable contract was formed.

4. St. Louis County Farm Bureau

Ms. Rimell listed a claim of $87.48, which she owed to St. Louis County Farm Bureau for an insurance premium. However, Ms. Rimell testified that (on August 25, 1989) she made a prepayment of that amount for health insurance coverage for the months of September, October, and November. Thus, Ms. Rimell owed nothing to this creditor on October 18, 1989, and St. Louis County Farm Bureau is excluded as Ms. Rimell's creditor for purposes of section 303(b) (2).

5. Southwestern Bell Telephone Company

Ms. Rimell listed Southwestern Bell Telephone Company (hereinafter "Southwestern Bell") as holding a claim for $59.84. Much like Sears, the Southwestern Bell account was maintained only in the name of "Albert Rimell". While Ms. Rimell may have written checks in payment of the Rimells' Southwestern Bell bills from family funds, her status was basically the same as in the case of the Sears charge account-- only an authorized user. Thus, under the same rationale, this Court holds that an authorized user of services does not place one in personal liability to a provider of such services. Accordingly, Southwestern Bell is not included as a creditor.

6. D & L Plumbing, Inc.

On October 4, 1989, D & L Plumbing, Inc. (hereinafter "D & L") performed work in the Rimell's home for which it charged $50. However, due to its own business relocation,

it failed to bill the Rimells until December 14, 1989, when Mr. Rimell insisted that D & L send them a bill. The petitioning Creditors claim that Mr. Rimell made this demand for a bill was made on the eve of trial solely for purposes of avoiding the entry of relief against Harriet Rimell. Therefore the Creditors argue that D & L should be excluded from Ms. Rimell's creditor count.

Sometime prior to October 4, 1989, Ms. Rimell requested by telephone that D & L perform work at the Rimell residence. Thus, on that date a contract was formed, and consequently a debt was incurred at that time. Thus, it follows that on October 18, 1989 the Rimells were indebted to D & L. The company's failure to send a bill until December 14, 1989, and then only upon the debtor's insistence, is of little consequence. The fact remains that D & L held an enforceable claim against Ms. Rimell

before the date of the filing, and thus D & L shall be counted as a section 303(b) (2) creditor.

7-11. Ms. Rimell's Attorneys

Counsel has represented Harriet Rimell both in this and other legal matters. In the instant case, Ms. Rimell is represented by Eugene Portman and Gerald A. Rimmel. In the past Ms. Rimell sought the advice and expertise of Messrs. Julius Berg, David Freyman, and Arthur Slonim, all of whom are attorneys and have ceased their legal representation in any pending matters. The petitioning Creditors argue that this Court should exclude all five of the attorneys from the creditor count as "insiders", as prohibited by section 303(b) (2).

While section 303(b) (2) excludes the counting of insiders as creditors in an involuntary proceeding, the Court has found no cases which adequately define the term in

this limited context, nor have the parties cited any such authority. Section 101 (30) of the Bankruptcy Code defines "insider", in pertinent part, as follows:

> (A) if the debtor is an individual--
> (i) relative of the debtor or of a general partner of the debtor;
> (ii) partnership in which the debtor is a general partner;
> (iii) general partner of the debtor; or
> (iv) corporation of which the debtor is a director, officer, or person in control;

Additionally, the legislative history of section 101(30) is instructive. Congress has stated that an 'insider" may be described as a person or entity with a "sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor". S. Rep. No. 95-989, 95th Cong., 2d Sess.,

reprinted in 1978 U.S. Code Cong. & Admin. News, pp. 5787, 5810.

Both the statute and its legislative history indicate that an insider may be someone who currently enjoys a fiduciary relationship with the debtor. This Court concludes that this definition is not limited and should be applied flexibly, on a case by case basis. Certainly an attorney, who invariably acquires confidential client information and whose relationship is governed by rules of professional conduct, may come under this categorization. This Court holds that the definition of "insider" provided in section 101(30) shall include an attorney who is owed money from a client who is currently defending the client in an involuntary bankruptcy petition. Applying the above rule, it is apparent that because both Mr. Portman and Mr. Rimmel represent Ms. Rimell in the instant case, neither would be

able to pursue his pecuniary remedies as a petitioning creditor without also breaching his duty to his client. Such action would create an impermissible conflict of interest between attorney and client. Therefore, neither shall be counted as Ms. Rimell's creditors.

A different issue concerns Messrs. Freyman, Berg, and Slonim-- none of whom currently represent Ms. Rimell. The Creditors argue that these three attorneys should be excluded from the section 303 (b) (2) counting of creditors because each of them have testified to their continuing and unbreachable attorney/client relationship with Harriet Rimell. In essence, the Creditors' proposed rule would exclude per se any attorney who had represented the debtor in any prior matter, regardless of whether it was in any way related to the pending involuntary bankruptcy. This Court believes

that such an exclusionary rule is both overbroad and unwarranted. While an attorney representing the debtor in the involuntary proceeding obviously would be called upon to take a position adverse to that of his client, the same cannot be said for a former attorney. In the latter scenario, the attorney is free to pursue the collection of his fees as would any other creditor. Thus, this Court holds that for purposes of section (b) (2) of the Bankruptcy Code an attorney who represented the debtor in a prior, unrelated matter may not be excluded per se from being counted as a creditor of the alleged debtor. Given this rule, it follows that Mr. Freyman, Mr. Slonim, and Mr. Berg will be counted as creditors.

B. Creditors of the Rimell Family Trust

The remaining eleven creditors[1] of the involuntary petition by the Rimell Family Trust, which, according to Ms. Rimell's testimony, derived its income solely from her paycheck deposits. The Creditors argue that all post-petition payments from the Trust made on pre-petition debt are excludable under section 303(b) (2) of the Bankruptcy Code. Section 303(b) (2) states:

> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under Chapter 7 or 11 of this title--
> ....
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such

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[1] This group included Tiffany Marble Company, Rollins Protective Service, Delmar Financial Company, CenCom of Missouri, Lawnicure Lawn Service, Union Electric, Laclede Gas Company, Central Hardware, Schneider Service Company, Mastercard, and Famous Barr.

> person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

Thus, the above language creates a checklist of creditors who may not be counted in determining whether the debtor has a sufficient number of creditors to place them in involuntary bankruptcy proceedings. Given the prior discussion of insiders and the inapplicability of the "employee" category to the instant case, the remainder of the discussion will focus on those enumerated Code sections which are applicable to this case.

The Creditors argue that certain creditors which Ms. Rimell listed should be excluded because they received post-petition transfers in violation of section 549(a). This Section states that:

(a) Except as provided in subsection (b)[2] or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2) (A) that is authorized only under this title;

or

(B) that is not authorized under this title or by the court.

The essence of this language, and a major focus of the Creditors' argument, is that a debtor may not, after the filing of the involuntary petition, pay pre-petition debts with money that was earned pre-petition. Ms.

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[2] Subsection (b) of section 549 states:

(b) In an involuntary case, a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

Subsection (c) of section 549 is inapplicable to the instant case.

Rimell claims that she never made any such transfers. Instead, she argues that the post-petition transfers either were made by a third party-- the Rimell Family Trust, or from Ms. Rimell's post-petition earnings. Therefore Ms. Rimell argues that these creditors should be included in the counting of her section 303 creditors. The petitioning Creditors argue that Ms. Rimell's claim is untenable for two reasons. First, the Trust does not constitute a legitimate third person from which a transfer could be made. Second, Ms. Rimell failed to carry her burden of proving that any post-petition transfers were made from her post-petition earnings.

A. Transfers From The Rimell Family Trust

Created on January 3, 1989, the Rimell Family Trust is revocable at any time. From its inception, Harriet and Albert Rimell

served as co-trustees. The Trust, which held as its sole asset the Rimell residence,[3]

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[3] Ms. Rimell testified that at approximately the same time as the Trust was formed, the Trust entered into a loan for $100,000, using the Rimell residence as collateral. Of this sum, Ms. Rimell distributed the funds as follows: approximately $25,000 to pay off an existing debt on the house, between $10,000 and $20,000 for house renovation, and the remainder of the funds in equal proportions to her three children for no consideration. Ms. Rimell testified that the main intent of the latter distribution was to provide for the medical care of her grandchild.

This is not the only transaction involving the alleged debtors which the Court finds suspect. First, on his June 1, 1988 personal financial statement, Albert Rimell stated to First Bank that he held cash in excess of $233,000, and government securities in excess of $17,000. In a separate financial statement, dated May 12, 1989, Mr. Rimell stated that he had cash and government securities totaling only $2,100. Second, within a year preceding the filing of the involuntary petition in the instant case, Mr. and Mr. Margulis conveyed their residence to LaRosa Enterprises, Inc., a Debtor-affiliated entity, for no consideration. Third, Morris Sherman Conveyed six parcels of real estate for no consideration to Camelot Realty, Inc., a debtor-related corporation.

The Court hardly finds these transfers of cash and real estate coincidental. Rather, it appears to the Court that the alleged Debtors, in an effort to frustrate

supposedly derived all of its income from the paychecks of Harriet Rimell. Ms. Rimell testified that she deposited all of her earnings in the Trust account, save for some cash withdrawals made at the time of the deposit.

This Court believes that the Trust, rather than constituting a "third person", is merely a synonym and an alternative guise for Albert and Harriet Rimell. First, Ms. Rimell testified that she used the funds of the trust to pay all bills related to their home. Testimony further showed that Ms. Rimell used Trust funds to pay a great number of personal and family living expenses. When asked why she didn't use a personal account at another bank, her only reasons were that this arrangement was "more convenient"

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the collection efforts of creditors, sought to reduce as much as possible from their personal estates.

and that she was angry with the bank where she held her personal account. Given that Ms. Rimell's paychecks and the interest derived therefrom supposedly were the Trust's sole source of income, and that she used these funds for personal expenses and the upkeep of her home, this Court chooses to adopt the Creditors' view that the Rimell Family Trust served as little more than Harriet Rimell's "personal checking account". Second, it is difficult to ignore the completely intertwined relationship which the Rimells had with the Trust. Ms. Rimell's role as sole contributor of Trust income, the Rimell's presence as co-trustees, and the fact that the only Trust asset was the Rimell family home, all point to the fact that Trust transfers were in no way those of a "third person". In fact, Mr. Rimell himself contradicted the notion of the Trust's independence when he stated: "I consider

Albert and Harriet Rimell and [the] Rimell Family Trust one and the same. Same assets, same vulnerability."

B. Burden of Proving Source of Post-Petition Transfer Funds

Section 549 of the Bankruptcy Code requires that in order to be counted for purposes of section 303, creditors must be paid with funds earned after the filing date of the involuntary petition. Ms. Rimell has claimed that all post-petition transfers to listed creditors were made with post-petition earnings. Given her assertion of the transfers' validity, Rule 6001 of the Bankruptcy Code places upon her the burden of proof. She has failed to carry this burden. During the entire three days of trial, counsel for Ms. Rimell offered no evidence to prove that the funds used to pay creditors post-petition were earned prior to the October 18, 1989 filing of the involuntary

petition. However, this Court is convinced, after the following examination of the evidence submitted, that the transfers were from pre-petition earnings.

In order to determine whether the funds were earned pre-petition, the Court must trace the deposits and debits of the Trust account. In so doing, the Court will use a "first in, first out" methodology. That is, the Court will assume that checks written against the account will reduce the oldest deposits first. The first step in tracing these funds is to determine the balance which existed on October 18, 1989-- the date of the Creditors' involuntary petition filing. The Trust's account statement, dated November 8, 1989, provides that the account held $10,074.41 on October 10, 1989. After subtracting $3,661.94 for checks which cleared between October 11 and October 18, a balance of $6,412.47 remains. Thus, as of

October 18, 1989, the balance of the Trust account was $6,412.47.

Before proceeding to the actual tracing of the funds, the Court wishes to address one other matter relating to the computation of the October 18, 1989 account balance. The November 8, 1989 statement of the Trust account shows deposits of $3,900 on October 19, $2,400 on October 26, and $2,400 on November 1. This Court chooses to exclude all three deposits from the Trust's pre-petition funds for the following reasons. First, the three checks were credited and debited to the account in the same amount on the same day. Prior Trust bank statements had never before reflected such "coincidental" occurrences. Thus, this Court concludes that the coincidental deposits and withdrawals into and out of the Trust were mere "wash" transactions which do not merit consideration. Second, Ms. Rimell testified

that the only funds deposited were from her earnings. However, this Court has difficulty believing this statement when she made consecutive weekly deposits of $3,900, $2,400, and $2,400, each of which greatly exceed her usual $1,250 per week salary.[4] Ms. Rimell never presented any evidence showing the source of this excess funds.

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[4] An examination of the bank statements of the Rimell Family Trust reveals that during the relevant time period Ms. Rimell made the following deposits into the Trust account:

Date	Amount
10/05/89	$5,250.00
10/19/89	$3,900.00
10/26/89	$2,400.00
11/01/89	$2,400.00

The Court notes that October 19, 1989-- two weeks after her previous deposit-- Ms. Rimell deposited $3,900 into the Trust account. This figure exceeds by $1,400 the $2,500 she would have received from two weeks salary. One week later, Ms. Rimell deposited $2,400 into the Trust account-- a sum which exceeds her $1,250 per week salary by $1,150. Finally, Ms. Rimell's second $2,400 deposit, made one week after the first, again exceeds her salary by the same $1,150.

Finally, the deposits were from Rimell Greystone, Inc., one of Mr. Rimell's companies, and the checks from the Trust were issued to another of Mr. Rimell's companies.

Regarding the actual tracing of the funds, the Court begins with a balance of $6,412.47 as of October 18, 1989. From this initial amount the Court subtracts all checks which cleared between October 18 and November 27, 1989-- the clearance date of the last check in payment of Ms. Rimell's pre-petition creditors. After subtracting these amounts, a balance of $2,414.24 in pre-petition funds remains. See Appendix 1 of this Opinion. Because there is money remaining in the Trust's pre-petition balance, it follows that all of Ms. Rimell's creditors were paid with pre-petition funds. Given this pre-petition payment, this Court may not count any of these creditors for purposes of section 303(b) (1)

CONCLUSION

The above analysis reveals that, for purposes of her section 303 creditor counting, Harriet Rimell has the following six creditors-- Pioneer Bank, R.B. Platt Development Co., D & L Plumbing, Inc., Julius Berg, David Freyman, and Arthur Slonim. Because this number is less than eleven (11), this Court holds that Harriet Rimell's defense, based upon an insufficient number of petitioning creditors, fails.

II. The Involuntary Bankruptcy of the Four Remaining Debtors

FACTS

The Creditors made fifteen separate loans to various entities with which the alleged Debtors are associated. Each of these loans was personally guaranteed by various combinations of Debtors. The Creditors claim the each of these loans is currently due and owing, and now seek to

enforce the personal guarantees against each of the alleged Debtors. None of the alleged Debtors disputes the amounts due, the genuineness or the terms of the guarantees, or the effect of their terms. The parties stipulated at trial that the claims of the petitioning creditors exceed $5,000.00 more than the value of any lien of the Debtors securing such claims. However, the alleged Debtors maintain that each of the petitioners' loans is subject to a bona fide dispute which would preclude the counting of those creditors for purposes of section 303(b) (1).[5] More specifically, the alleged

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[5] In addition to claiming that there exists a bona fide dispute as to the debts, the Debtors also asserted in their Answers the following affirmative defenses, on which they presented no evidence at trial: 1) No final judgment has been rendered in the Creditors' lawsuits (alleging similar claims) filed against the Debtors in the Circuit Court of St. Louis County; 2) Debtors are paying all of their just and proper debts as they mature; 3) The Creditors have filed their Petitions in bad faith and have

Debtors claim that the loans are not yet due because each of the four Creditors agreed at the time of each loan transaction that, upon Mr. Rimell's request, they would extend the terms of the loan, lower the current rate of interest on the loan, or amend the loans to provide terms more favorable to the alleged Debtors.[6] In sum, the alleged Debtors contend that the four Creditors promised, at the time of each initial loan transaction, that they would, if requested, continually extend the loan until the alleged Debtors had

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prosecuted this proceeding with malice and without probable cause; and 4) The failure of the Creditors to fulfill and perform the commitments and obligations owed to the Debtors regarding the loans in controversy estops the Creditors from obtaining the relief sought in their Petition. The Court considers these defenses abandoned.

[6] Alleged Debtor Albert Rimell testified that each of the Creditors basically agreed that he could request these amendments as he wished, provided such request were reasonable.

sold the respective property which collateralized the loans.[7]

The alleged Debtors offered no documentary evidence reflecting or embodying the alleged agreement. However, the alleged Debtors have offered two theories which evidence their agreements with the Creditors. First, they claim that the parties at each loan transaction made an express oral agreement that the Creditor would not call the loan if it came due before the property was sold. All loan officers taking part in each of the transactions have denied ever entering into such agreements. Second, the alleged Debtors maintain, in the alternative,

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[7] Mr. Rimell testified that the Creditors were well aware at the time of each loan transaction that Mr. Rimell and his partners were seeking to purchase real estate for speculative purposes. That is, the Creditors knew that the loans could not be paid off until the real estate had been sold. Thus, Mr. Rimell claims that the Creditors' promises not to call the loans when they came due were logical, foreseeable occurrences.

that the agreements are evidenced by the parties' prior course of dealing. In short, the alleged Debtors claim that because the Creditors had refused to call prior loans as the became due, this Court should infer that the parties reached a similar agreement in the instant case.[8]

DISCUSSION

Section 303(b) (1) of the Bankruptcy Code states:

> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under Chapter 7 or 11 of this title--
>
> > (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such holder, if such claims aggregate at least $5,000 more than the value of any lien on

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[8] Testimony at trial reflects the fact that while Mercantile never extended any of its loans with the Debtor-affiliated partnerships, it did refinance some of these loans. This Court chooses to treat these actions as one and the same.

> property of the debtor securing such claims held by the holders of such claims; (emphasis added)

Thus, if there is a bona fide dispute as to the debtor's liability, section 303(b) (1) precludes the court from counting that creditor for purposes of the involuntary proceeding. In the instant case, the Debtors claim that the bona fide dispute as to when each of their loans is due precludes this Court from counting any of the Creditors in this section 303 proceeding. Thus, if the alleged Debtors' assertion is correct, the Creditors' efforts to place them in involuntary bankruptcy must fail. As in the previous issue involving Harriet Rimell, it is the alleged debtors who bear the burden of proving that such a bona fide dispute exists. In re Einhorn, 59 B.R. 179, 185 (Bankr. E.D.N.Y. 1986) (once debts are established, debtor bears burden of proving otherwise).

This Court finds that for purposes of section 303(b) (1) the alleged Debtors have failed to offer sufficient evidence to raise this controversy over contractual terms to the level of a bona fide dispute. In short, this Court concludes that because no agreement existed such as that asserted by the alleged Debtors, there could be no bona fide dispute over the terms of the "agreement".

A. Express Oral Agreement

Albert Rimell testified that each Creditor orally agreed, at the time of the loan transaction, that it should extend the terms of the loan, lower the rate of interest, or amend the loan with terms more favorable to the alleged Debtors. While this Court has little doubt that Mr. Rimell may have made such requests, there is no evidence to confirm that the parties ever <u>agreed</u> to such terms. First, all four of the bank

representatives denied, under oath, that they ever agreed to such terms. Second, the alleged Debtors have failed to offer one piece of documentary which reflects the terms of the agreements which they assert, including any notes of such agreements. Thus, this Court concludes that, contrary to the alleged Debtors' assertions, the parties in this case never orally agreed to extend, modify, or alter the existing written terms of the loans. Therefore there could be no "bona fide dispute" as to the terms of the agreement as none ever existed.

B. Course of Dealing

The alleged Debtors also contend that because the Creditors had refused to call prior loans as they became due, this Court should infer from this prior course of dealing that an extension of loan terms took place in the instant case. This Court,

however, does not believe that prior loan transactions between parties are sufficient to constitute a "course of dealing", as the same might be understood in general contract law. Instead, given that each prior loan had differing and unique terms, this Court chooses to treat each loan transaction as a separate independent agreement. Thus, by definition there could be no prior course of dealing from which this Court could infer that the parties agreed in advance to the terms of future borrowings which the alleged Debtors assert in the instant case.

CONCLUSION

This Court has concluded that the parties did not, either orally or through prior course of dealing, agree to alter, extend, or modify the existing written contractual terms on any of the loans in the instant case. Given that the parties did not agree to such terms, it follows that there

could be no bona fide dispute. Similarly, in the case of Harriet Rimell, an examination of all creditors revealed that the requisite number of petitioning creditors exist. Accordingly, it is

ORDERED that, pursuant to section 303 of the Bankruptcy Code, an Order for relief under Title 11, Chapter 7 is hereby entered against Harriet Rimell, Albert Rimell, Rosalyn Margulis, Lawrence Margulis, and Morris Sherman.

APPENDIX OMITTED

/s/ Barry S. Schermer
Barry S. Schermer
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

In re

ALBERT RIMELL,	Case No. 89-04383-BSS
HARRIET RIMELL,	Case No. 89-04382-BSS
MORRIS SHERMAN,	Case No. 89-04385-BSS
ROSALYN MARGULIS,	Case No. 89-04385-BSS
LAWRENCE MARGULIS,	Case No. 89-04387-BSS

Debtors

Decided March 7, 1990

MEMORANDUM OPINION AND ORDER

INTRODUCTION

On February 15, 1990, Debtors Harriet and Albert Rimell, Morris Sherman, and Rosalyn and Lawrence Margulis (hereinafter the "Debtors") filed a Motion to Set Aside and Vacate the Memorandum, Order, and Opinion Entered on February 5, 1990 (hereinafter the "Motion"). Debtor Harriet Rimell alleges that this Court failed to count certain of her creditors, the addition of which would preclude her placement in involuntary bankruptcy. The remaining Debtors join Ms. Rimell in arguing that this Court erroneously

determined, based in part on inconsistent testimony, that no bona fide dispute existed between the Debtors and the petitioning creditors regarding the renewal and extension of various loans.

JURISDICTION

This court has jurisdiction over the subject matter of the proceeding pursuant to 28 U.S.C. sections 151, 157, 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" which the Court may hear and determine pursuant to 28 U.S.C. section 157(2) (O),

DISCUSSION

Rule 59 of the Federal Rules of Civil Procedure, which is incorporated into the Bankruptcy Code by Bankruptcy Rule 9023, allows a party to file a motion requesting a new trial and an amendment of the prior judgment. In Hagerman v. Yukon Energy Corp.,

839 F.2d 407, 414 (8th Cir.), cert. denied, 109 S. Ct. 63 (1988), the Eighth Circuit quoted with approval the following statement from Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987), as amended, 835 F.2d 710 (7th Cir. 1987):

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce evidence that could have been adduced during pendency of the [trial] .... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Thus, a court may only grant a motion for reconsideration when the movant either 1) produces evidence that they could not have introduced at the previous hearing, or 2) presents legal or factual errors that existed in the previous ruling. This Court concludes that the Debtors have failed to meet either of these two requirements.

I. The Counting of Harriet Rimell's Creditors

Ms. Rimell first alleges that this Court erred in failing to count seven co-guarantors of the First Bank claim and two co-guarantors of the Mark Twain Bank (hereinafter "Mark Twain") loans, as both banks have now filed suit to collect on the guarantees. However, this Court need not reach the merits of this contention as none of these parties was listed as a creditor of Ms. Rimell prior to trial. This fact is conceded by the Debtors in their accompanying Memorandum, which states that:

> [a]lthough the foregoing facts were not specifically called to the attention of the Court at the hearing, these creditors appear in the documents submitted by petitioning creditors.[1]

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[1] The Court notes that in a case containing approximately one hundred exhibits, Debtor's counsel failed to direct the Court's attention to any document to which he referred.

This Court does not believe that it is charged with the duty of inferring the existence of creditors which the debtor is specifically required to list. See Bankruptcy Rule 1007(a) (2). In addition, counsel for Ms. Rimell have never proffered evidence which would excuse the omission of these creditors from her list. Thus, this Court cannot include these parties in Ms. Rimell's section 303 (b) (2) creditor count.

Ms. Rimell also believes that this Court's improper denial of her motion to include St. Louis County as a creditor on the trial now mandates its inclusion. This Court, however, stands firm in its belief that to allow the inclusion of creditors literally minutes before trial completely fails to give opposing parties the adequate notice to which they are entitled under Rule 1003(b) of the Bankruptcy Code. Thus, St.

Louis County may not be included in Ms. Rimell's counting of creditors.

Ms. Rimell also attached to her Motion a letter, dated December 7, 1989, sent by a Famous-Barr credit manager to opposing counsel. Ms. Rimell claims that because the letter's contents reflect the fact that an outstanding balance existed on the date of filing, this Court should add Famous-Barr to her list of section 303(b) (2) creditors. This contention, however, contains several flaws. First, Ms. Rimell never originally listed Famous-Barr as one of her creditors, and has failed to offer any evidence which would excuse such an omission. The only evidence which this Court heard regarding Famous-Barr was that it received payment from the Rimell Family Trust with pre-petition funds, which this Court found excluded this Creditor from being counted. Second, even if Ms. Rimell had properly listed Famous-Barr as

a creditor, the letter from Famous-Barr's credit manager does not establish Ms. Rimell's liability for the debt. Thus, this Court declines to include Famous-Barr in the counting of her creditors.

Finally, Ms. Rimell contends that this Court should have counted the petitioning creditors, First Bank and Mark Twain. Although Ms. Rimell never specifically listed these creditors (see debtor's list of creditors filed pursuant to Rule 1007), this Court believes that they rightfully should be counted as section 303(b) (2) creditors. Yet even with the addition of these two creditors, Ms. Rimell's creditor count only rises to eight. Thus, because Ms. Rimell has not established that she has eleven or more creditors, the order for relief was properly entered.

II. Issues Pertaining to All Five Debtors

In Matter of Busick, 831 F.2d 745 (7th Cir. 1987), the Seventh Circuit, reviewing the court's definition of "bona fide dispute" in In re Lough, 57 B.R. (E.D. Mich. 1986), stated:

> We agree with the district court that the standard employed by the court in Lough is the formulation most compatible with the Congressional intent.[footnote omitted] Under that standard, "if there is a bona fide dispute as to either the law or the facts, then the creditor does not qualify and the petition must be dismissed." Lough, 57 B.R. at 997; see In re Garland Coal & Mining Co., Lough standard). Under this standard, the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. However, "[t]he statute does not require the court to determine the outcome of any dispute, only its presence or absence. Only a limited analysis of the claims at issue is necessary." Busick, 65 B.R. at 637.
>
> 831 F.2d at 749-50.

Thus, courts facing this issue utilize an objective standard which requires them to answer only one question: does a bona fide dispute exits in the instant case?

The Debtors allege that this Court erred in ruling that none of the loans in question were subject to a bona fide dispute (thus precluding the counting of these creditors for purposes of section 303(b) (1). More specifically, the debtors contend that 1) the Court's ruling was based in part on "erroneous testimony", and 2) the Court erroneously determined the merits of the "bona fide disputes" rather than determining whether such disputes existed. In support of the contention that inconsistent testimony was presented at trial, the Debtors have proffered a letter, dated September 14, 1987, which John D. Haffenreffer, Vice President of Centerre Bank, sent to Albert Rimell. In the letter, Mr. Haffenreffer requests that Mr.

Rimell remit payment to a local law firm "for services rendered and expenses advanced on behalf of Centerre in connection with renewals and modification of loans to Albert Rimell, Inc. and related entities and individuals". The Debtors contend that the text of this letter contradicts Mr. Haffenreffer's prior testimony, in which he denied ever having promised that he would allow the Debtors to alter, amend, or modify the terms of existing loans.[2] The Debtors further assert that the conflict in testimony between Albert Rimell and the officers of each bank proves the existence of a bona fide dispute.

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[2] The Court notes that the Debtors have offered no reason why this document was not produced at trial, only that it was "discovered after the hearing by a former secretary of Albert Rimell".

The Debtors contend that certain bank officers promised to continually renew or alter the terms of various loans, subject to the reasonable request of Albert Rimell. According to the Debtors, the bona fide dispute focuses on when the loans are due rather than the amount due. Thus, because the banks failed to renew or extend the loans as promised, the Debtors argue that the debt on these loans is not yet due. The letter proffered by the Debtors refers to the renewal or modification of loans between Centerre and various Debtor-related entities, but neither its text nor the accompanying law firm time sheets refers to a specific loan. Certainly one cannot conclude, simply by examining either one of these documents, that any modifications or renewals necessarily concerned any of the loans in the instant case. Thus, this Court must assume that the Debtors have offered this evidence to

establish the existence of a course of dealing between the parties in which Centerre would renew or extend the terms of existing loans upon Albert Rimell's request.

This Court concludes that the evidence proffered does not establish the existence of a general agreement between the parties to renew or modify all loans upon request.[3] Under Busick, a Court need only look objectively at the evidence presented to determine whether a bona fide dispute existed. Upon reviewing the evidence, this Court cannot determine, using an objective standard, that a bona fide dispute existed because neither the newly submitted evidence nor any of the Debtors' evidence proves the existence of an agreement to renew or modify

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[3] In addition, this Court ruled, and continues to believe that the refusal to call prior loans does not constitute a course of dealing, as each loan transaction was a separate, independent agreement.

the terms of loans between the parties. However, even if the recently submitted documents were dispositive of such an agreement, this would pertain only to Centerre (now Boatmen's), and the requisite three petitioning creditors-- First Bank, Mark Twain, and Mercantile Bank National Association-- would remain.

In sum, the Debtors failed to establish the existence of an express agreement allowing Mr. Rimell to initiate unilaterally a loan renewal or extension. Nor did they proffer evidence to support their assertion that past loan modifications or renewals were triggered by Mr. Rimell's unilateral request. Rather, the evidence supports the petitioning creditors' contention that prior loan renewals or modifications were the result of mutual agreement. Thus, viewed objectively, as a matter of law and fact this Court concludes that no bona fide dispute existed

as to when the loans were due because none of the loans was renewed or modified upon Mr. Rimell's unilateral request. Therefore, having reviewed the Debtors; additional evidence, this Court continues to believe that its order granting relief was proper. Accordingly, it is

ORDERED that the requisite number of creditors existed to place Harriet Rimell in involuntary bankruptcy, no bona fide dispute existed as to the terms of the loans in the instant case, and the Debtors' Motion to Set Aside and Vacate the Memorandum and Opinion Entered on February 5, 1990 is DENIED.

/S/ Barry S. Schermer
United States Bankruptcy Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:

HARRIET RIMELL,
Debtor.
HARRIET RIMELL,
Appellant, No. 90-804-C

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees.

In Re:

ALBERT RIMELL,
Debtor,
ALBERT RIMELL,
Appellant, No. 90-805-C

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees.

ORDER

In accordance with the memorandum filed herein this day, the Judgement and Order of the Bankruptcy Court in the above styled cases is **AFFIRMED.**

Dated this 15th day of November, 1990.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:
HARRIET RIMELL,
Debtor.
HARRIET RIMELL,
Appellant, No. 90-804-C (5)

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees

In Re:
ALBERT RIMELL,
Debtor,
ALBERT RIMELL,
Appellant, No. 90-805-C (2)

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees. November 15, 1990

MEMORANDUM

I. Introduction

This matter is before the Court on appeal from orders for relief entered against Harriet Rimell and Albert Rimell by the United States Bankruptcy Court for the

Eastern District of Missouri. This Court has jurisdiction to hear this appeal under 28 U.S.C. section 1334. By motion of appellees, the Court consolidated for appeal the causes of Harriet Rimell and Albert Rimell.

II. Issues Presented

The issues on appeal are 1) whether the debts allegedly owed to the petitioning creditors were subject to a bona fide dispute, disqualifying creditors from bringing an involuntary petition under 11 U.S.C. section 303; and, 2) whether the Bankruptcy Court properly determined that Harriet Rimell had fewer than twelve creditors, permitting only two creditors to bring an involuntary petition against her under 11 U.S.C. section 303(b) (2)/

III. Standard of Review

This court must affirm the decision of the Bankruptcy Court if it is supported by law and the facts contained in the record.

The Bankruptcy Court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses. In re Martin, 761 F.2d 472, 474 (8th Cir. 1985). Under Bankruptcy Rule 8013, findings of fact are clearly erroneous when they are not supported by substantial evidence, contrary to the clear preponderance of the evidence, or based on an erroneous view of the law. In re Cook, 72 Bankr. 976 (W.D.Mo. 1987). Conclusions of law are subject to de novo review. In re Martin, 761 F.2d at 474.

IV. Procedural Posture

On October 18, 1989, Mark Twain Bank and First Bank ("petitioning creditors:) filed separate involuntary bankruptcy petitions against Harriet Rimell and Albert Rimell ("debtors"). This was one of a series of actions in which Mark Twain and First Bank,

along with two other banks, filed involuntary Chapter 7 petitions against Albert Rimell and Harriet Rimell. The Rimells, along with three others,[1] engaged in certain loan transactions for real estate speculation. The debtors claimed as an affirmative defense that the debts allegedly owed were subject to a bona fide dispute, disqualifying those creditors from bringing an involuntary petition against them under 11 U.S.C. section 303.

Harriet Rimell also claimed that she had twelve or more creditors, thus the Bankruptcy Court lacked subject matter jurisdiction under 11 U.S.C. section 303 (b) (1) in that only two creditors joined the involuntary

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[1] The Bankruptcy Court consolidated for trial the cases of Harriet Rimell, Albert Rimell and the three others. Only the appeals of Harriet Rimell and Albert Rimell are before this Court.

petition.[2] The Bankruptcy Court held a consolidated trial and entered its order for relief in both cases on February 5, 1990. Both debtors now appeal that judgment.

V. Bona Fide Dispute Issue

A. Facts

The Bankruptcy Court made the following findings of fact. The creditors made fifteen separate loans to various entities with which the debtors are associated. Each of these loans was personally guaranteed by the debtor or their business associates. The debtors do not dispute the amounts due, the genuineness or the terms of the guarantees, or the effect of the terms. The debtors claim, however, that the loans are not yet due because each of the creditors agreed at the time of each

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[2] Section 303(b) (1) requires three petitioning creditors. However, when there are fewer than twelve creditors, section 303(b) (2) would allow only two petitioning creditors.

loan transaction that, upon Mr. Rimell's request, they would extend the terms of the loan, lower the current rate of interest on the loan, or amend the loans to provide terms more favorable to the debtors. The debtors contend that the creditors promised, at the time of each initial loan transaction, that they would, if requested, continually extend the loans until the alleged debtors had sold the respective property which collateralized the loans.

The debtors offered no documentary evidence of these alleged agreements. They claimed first that each of the loans officers made express oral agreements that the creditor would not call the loan if it came due before the property was sold. All loan officers taking part in the transactions denied ever entering into such agreements. The debtors failed to offer sufficient evidence to raise the controversy over

contractual terms to the level of a bona fide dispute.

The Bankruptcy Court found that the parties never orally agreed to extend, modify, or alter the existing written terms of the loans. "[T]his Court concludes that because no agreement existed such as that asserted by the alleged Debtors, there could be no bona fide dispute over the terms of the 'agreement'". In Re: Rimell, No. 89-043282-BSS, Memorandum Opinion and Order at 20-21 (Bankr.E.D.Mo. Feb. 5, 1990).

The debtors also asserted that the agreements are evidenced by the parties' prior course of dealing. They contended that because the creditors refused to call prior loans as they became due, there was an extension of loan terms in this case also. The Bankruptcy Court found that each prior loan had differing and unique terms and was therefore a separate, independent agreement.

It found that the prior loan trans actions between the parties were not sufficient to constitute a "course of dealing." In Re: Rimell, No. 89-04382-BSS, Memorandum Opinion and Order at 22-23 (Bankr.E.D.Mo. Feb. 5, 1990).

B. Applicable law

Section 303(b) (1) of the Bankruptcy Code provides:

> (b) An involuntary case against a person is commenced by the filing with the Bankruptcy Court of a petition under Chapter 7 or 11 of this Title--
>
> (1) By three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture

trustee representing such a holder

. . .

11 U.S.C. section 303(b) (1) (emphasis added). If a bona fide dispute exists as to the debtor's liability, section 303(b) (1) precludes the court from counting that creditor for purposes of the involuntary proceeding. The alleged debtors bear the burden of proving that a bona fide dispute exists. In re Einhorn, 59 Bankr. 179, 185 (E.D.N.Y. 1986).

The statute does not define "bona fide dispute." Bankruptcy courts have used various formulations of the standard. See, e.g., in re Lough, 57 Bankr. 993 (E.D.Mich. 1986); In re Stroop, 51 Bankr. 210 (D.Colo. 1985); In re Johnston Hawks, Ltd., 49 Bankr. 823 (D.Haw. 1985). The Seventh Circuit surveyed the various approaches and determined that the standard employed by the court in Lough is the most compatible with

Congressional intent. Matter of Busick, 831 F.2d 745, 749 (7th Cir. 1987). See also In re Garland Coal & Mining Co., 67 Bankr. 514 (W.D.Ark. 1986) (adopting the Lough standard).

This Court also adopts the Lough standard, under which the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. Busick, 831 F.2d at 750.

C. Conclusion

This Court finds that the Bankruptcy Court's findings of fact are not clearly erroneous. Thus, the Court holds that based on the applicable law that the claims creditors held against debtors were not subject to a bona fide dispute. Therefore, creditors are entitled to relief pursuant Title 11, Chapter 7 of the Bankruptcy Code.

VI. Number of Creditors Issue

A. Facts

Ms. Rimell listed a total of twenty-two creditors. The Bankruptcy Court found that as of the date of filing Ms. Rimell owed debts to only eight creditors. The two petitioning creditors plus six others[3] held claims against her. In reaching this decision, the Bankruptcy Court excluded sixteen of the twenty-four listed creditors because: 1) three did not held claims against Ms. Rimell as of the filing date; 2) two were "insiders: of Ms. Rimell; and 3) eleven received unauthorized post-petition payment of their prepetition claims.

B Applicable law

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[3] Pioneer Bank & Trust Co. ("Pioneer") was one of the creditors the Bankruptcy Court found had a claim against Ms. Rimell. Pioneer since has been added as a petitioning creditor.

Any creditor holding an unsecured claim that is not contingent may join in the petition after the filing but before the case is dismissed or relief is ordered. 11 U.S.C. 303(c). The effect is the same as if such joining creditor were a petitioning creditor. The Bankruptcy Court found that Pioneer Bank & Trust Co. ("Pioneer") was a creditor holding a claim against Harriet Rimell. In Re: Rimell, No. 89-04382-BSS, Memorandum Opinion and Order at 5 (Bankr.E.D.Mo. Feb. 5, 1990). After this case was appealed to this Court, Pioneer moved to join as a petitioning creditor under 11 U.S.C. section 303(c). Debtors did not oppose Pioneer's motion to join as a petitioning creditor and this Court granted that motion. Order at 2 (July 16, 1990).

C. Conclusion

The effect of Pioneer's joinder as a petitioning creditor is to bring the number

of petitioning creditors against Harriet Rimell to three. Therefore, the issue of whether Harriet Rimell had fewer than twelve creditors, permitting only two creditors to bring an involuntary petition against her is moot.

Additionally, this Court finds that the findings of the Bankruptcy Court were supported by the facts and the law. Thus, even if Pioneer had not joined as a petitioning creditor, the decision of the Bankruptcy Court would be affirmed.

Accordingly, for the foregoing reasons the Judgment and Order of the Bankruptcy in the above styled actions will be affirmed.

Dated this 15th day of November, 1990.

/S/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-3054EM

In re: Harriet Rimell, Debtor.

Harriet Rimell,
Appellant,

v.

Mark Twain Bank; First Bank;
and Pioneer Bank,
Appellees.

* * * Appeal from the United States District Court for the Eastern District of Missouri.

In re: Albert Rimell, Debtor

Albert Rimell,
Appellant,

v.

Mark Twain Bank; First Bank;
and Mercantile Bank, N.A.

Submitted: September 10, 1991

Filed: October 15, 1991

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Albert and Harriet Rimell appeal the district court's affirmance of orders made by the bankruptcy court.[1] We affirm the district court[2] in all respects.

I. BACKGROUND

Mark Twain Bank and First Bank filed involuntary bankruptcy petitions against Harriet Rimell. These two banks, along with two additional banks, also joined in involuntary bankruptcy petitions against

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[1] The Honorable Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri. Judge Schermer's opinion is reported as In re Rimell, 111 B.R. 250 (Bankr. E.D. Mo. 1990).

[2] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri. Judge Limbaugh's decision is reported as In re Rimell, 121 B.R. 253 (E.D. Mo. 1990)

Albert Rimell and three other individuals.[3] The petitions were based on loans the banks made to various entities with which the debtors were associated. At least one of the five debtors personally guarantied each of the loans.

The petitions were consolidated into one proceeding before the bankruptcy court. The debtors argued that the banks could not institute involuntary proceedings because the loans were subject to a bona fide dispute. More specifically, the debtors argued the loans were not due because the banks had orally agreed that, upon Albert Rimell's request, the terms of the loans would be modified in a variety of ways to allow the debtors more time to repay their obligations.

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[3] The other three debtors did not appeal the bankruptcy court's orders to the district court and are not parties to this appeal. For ease of discussion, the quintet will be referred to collectively as "the debtors."

Harriet Rimell, in addition to joining in this argument, also asserted that because she had more than twelve creditors, the Bankruptcy Code (hereinafter "the Code") required at least three creditors to petition for her forced entrance into bankruptcy.

The bankruptcy court determined there was insufficient evidence to show that the parties ever agreed that the terms would be automatically modified upon Albert Rimell's request. Rimell, 111 B.R. at 258-59. In counting Harriet Rimell's creditors, the bankruptcy court ultimately held that she had eight creditors; it rejected the remaining sixteen proffered creditors because, in the words of the district court, "1) three did not hold claims against Ms. Rimell as of the filing date; 2) two were 'insiders' of Ms. Rimell; and 3) eleven received unauthorized post-petition payment of their prepetition claims." Rimell, 121 B.R. at 257.

The Rimell's appealed to district court; at some time prior to the district court's decision, Pioneer Bank joined the involuntary petition against Harriet Rimell. The district court affirmed the bankruptcy court's decision that the loans were not subject to a bona fide dispute and further determined that the number of Harriet Rimell's creditors was moot because Pioneer Bank joined the petition as the third creditor.

II. DISCUSSION

A. The Existence of a Bona Fide Dispute

The Code allows an involuntary case to be commenced when three or more entities holding claims against the debtor file a petition so long as those claims are "not contingent as to liability or the subject of a bona fide dispute." 11 U.S.C. section 303(b) (1) (1988). The Code does not define

a "bona fide dispute" and thereby leaves the term's meaning to judicial determination.

This circuit has never had occasion to define the term. Our efforts to do so on this occasion are guided by the prior efforts of other circuits. We note that the three circuits that have addressed this issue have been heavily persuaded by the reasoning contained In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986), and have adopted substantially similar tests for determining the existence of a bona fide dispute. Both the Seventh and the Tenth Circuits have stated that the proper standard requires the bankruptcy court to "determine whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt." Matter of Busick, 831 F.2d 745, 750 (7th Cir. 1987); Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1544 (10th Cir. 1988) (quoting Busick). The Third Circuit, relying

on the Seventh Circuit's decision in Busick, has indicated that a bona fide dispute exists if there are "'substantial' factual and legal questions raised by the debtor" bearing upon the debtor's liability. B.D.W. Assoc. v. Busy Beaver Building Center, Inc., 865 F.2d 65, 66-67 (3d Cir. 1989) (citing Busick, 831 F.2d at 750). Because we agree with the Seventh Circuit that this approach best effectuates Congress' intent, see Busick, 831 F.2d at 749, we also adopt this objective inquiry to determine whether a bona fide dispute exists.

In applying this standard, the petitioning creditor must establish a prima facie case that no bona fide dispute exits. Once this is done, the burden shifts to the debtor to present evidence demonstrating that a bona fide dispute does exist. Bartmann, 853 F.2d at 1544. Because the standard is objective, neither the debtor's subjective

intent nor his subjective belief is sufficient to meet this burden. Id. The court's objective is to ascertain whether a dispute that is bona fide exists; the court is not to actually resolve the dispute. Id. This does not mean that the bankruptcy court is totally prohibited from addressing the legal merits of the alleged dispute; indeed, the bankruptcy court may be required to conduct a limited analysis of the legal issues in order to ascertain whether an objective legal basis for the dispute exits. Busick, 831 F.2d at 750. Finally, because the determination as to whether a dispute is bona fide will often depend (as it did in this case) upon an assessment of witnesses' credibilities and other factual considerations, the bankruptcy court's determination in this regard is a factual finding that may be overturned on appeal only

if it is clearly erroneous. See Bankruptcy Rule 8013.

In the case at bar, the bankruptcy court conducted the inquiry we now hold to be appropriate. Specifically, the bankruptcy court examined the loan documents proffered by the banks and noted that the parties did not dispute "the amounts due, the genuiness or the terms of the guarantees, or the effect of their terms." Rimell, 111 B.R. at 257. The court then afforded the debtors an opportunity to present evidence that there was an additional, oral agreement that allowed the debtors to change the loans' terms at will in order to facilitate payment. After reviewing the evidence, the bankruptcy court concluded that "the parties did not, either orally or through prior course of dealing agree to alter, extend or modify the existing written contractual terms on any of the loans in the instant case. Given that

the parties did not agree to such terms, it follows that there could be no bona fide dispute." Id. at 259. We have reviewed the record and do not believe the bankruptcy court's findings are clearly erroneous; hence, we affirm the determination that the banks' claims were not subject to a bona fide dispute.

B. The Counting of Harriet Rimell's Creditors.

Although an involuntary case generally requires three or more creditors to joint the petition, the Code requires only one creditor to request involuntary proceedings if the debtor has less than twelve creditors. 11 U.S.C. section 303(b) (2) (1988). It does not appear that the bankruptcy court erred in classifying Harriet Rimell's creditors and concluding that she had less than twelve creditors; however, we do not address this issue in detail because we agree with the

district court that Pioneer Bank's joinder in the petition renders this issue moot.

The Code specifies that "a creditor holding an unsecured claim that is not contingent . . .may join in the petition with the same effect as if such joining creditor were a petitioning creditor. . ." Id. section 303(c). The joining creditor must not have been an original party to the petition and the joinder must take place before "the case is dismissed or relief is ordered." Id.

Pioneer Bank joined the petition filed by Mark Twain Bank and First Bank within the time required by section 303(c). Therefore, Pioneer Bank is to be treated as if it had joined the petition ab initio, thereby increasing the effective number of petitioning creditors to three. Consequently, it no longer matter how many creditors were needed to join the petition. 2

Collier on Bankruptcy section 303.33 (15th ed. 1979).

III. Conclusion

The bankruptcy court's determination that the banks' claims were not subject to a bona fide dispute was not clearly erroneous. The number of Harriet Rimell's Creditors is moot due to Pioneer Bank's joinder in the involuntary petition originally filed by First Bank and Mark Twain Bank. Consequently, we affirm the district court's affirmance of the bankruptcy court's decisions on these matters.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-3054EMSL

In Re: Harriet Rimell, Debtor

Harriet Rimell,
Appellant,

vs.

Mark Twain Bank; First Bank; and Pioneer Bank,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

* * * * * * * * * * *

In Re: Albert Rimell, Debtor

Albert Rimell,
Appellant,

vs.

Mark Twain Bank; First Bank; and Mercantile Bank, N.A.

Appellants' petition for rehearing has been considered by the court and is denied.

December 3, 1991

Order Entered at the Direction of the Court:

/S/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit.

SUPREME COURT of the UNITED STATES

No.

A-618

Harriet Rimell, et vir,

Petitioners

v.

Mark Twain Bank, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including 1 April, 1992.

/S/ Harry A. Blackmun
Associate Justice of the Supreme Court of the Untied States

Dated tnis 25th
day of February, 1992

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

Mercantile Bank, N. A.

Plaintiff

VS

Cleveland Arms Apartments, Inc. et al

Defendant

Date: September 5, 1989
Case Number: 586280
Team/Division: B

Plaintiff's motion for summary judgement is overruled.

/S/ Richard Provaznik
Judge/Division

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

Mercantile Bank National Association
Plaintiff

VS

Lawrence Margulis, et al.
Defendant

Date:	January 31, 1989
Case Number:	581471
Team/Division:	B

Plaintiff Mercantile Bank National Association's Motion For Summary Judgment called; heard and denied without prejudice.

/S/ Arthur Litz
Judge/Division

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

Mercantile Bank NA

Plaintiff

VS

Lawrence Margulis, et al.

Defendant

Date:	January 31, 1989
Case Number:	581469
Team/Division:	B

Plaintiff's Motion For Summary Judgment, called heard and dismissed, without prejudice.

/S/ Arthur Litz
Judge/Division

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

The Boatman's National Bank of St. Louis
Plaintiff

VS

Albert Rimell, Inc. et al
Defendant

Date:	March 5, 1991
Case Number:	598450
Team/Division:	Team B. Div 6

Plaintiff's Motion For Summary Judgement argued, submitted and denied.

/S/ Robert Satz
Judge/Division

Supreme Court, U.S.
FILED
APR 30 1992
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(2)

No. 91-1584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

vs.

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

vs.

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 91-1584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

vs.

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
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vs.

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement Of The Case

The issue is whether 16 debts Petitioners owe the creditor banks are subject to a bona fide dispute,

within the meaning of 11 U.S.C. § 303(b)(1). Petitioners admitted the execution of the notes in question by various partnerships or corporations with which they were affiliated. Petitioners also admitted executing the guarantees or the notes which form the basis for their liability. Petitioners also admitted that there was a balance due on each of the 16 loans.

The terms of each note and each guarantee unconditionally obligated Petitioners to pay the balance due. Petitioners claim that this promise is disputed, because the banks "orally agreed" to extend the loans, on terms more favorable to the borrowers, until the underlying collateral was sold. The courts below held that an objective person would not find this sort of creative defense to give rise to a bona fide dispute.

Petitioners are currently under indictment in the United States District Court for the Eastern District of Missouri, for committing bank fraud in connection with these loans, and bankruptcy fraud in connection with these proceedings.

Reasons Why The Writ Should Be Denied

I. The Court Below Defined "Bona Fide Dispute" In Accordance With A Uniform Standard Applied By Every Other Circuit Court.

This Petition asserts that the lower courts have developed "five different definitions" of "bona fide dispute," as used in 11 U.S.C. 303(b)(1). Pet. at 17. In fact, the Circuit Courts have developed a uniform test: whether there is "an objective basis for either a factual or a legal dispute as to the validity of the debt." Matter of Busick, 831 F.2d 745, 750 (7th Cir. 1987). That is the standard adopted by the Court below, App. 72-73, as well as the three other Circuit Courts to consider the issue.

The origin of this standard is In Re Lough, 57 B.R. 993 (Bankr. E.D. Mich 1986). Lough contains an extensive analysis of both the legislative history

and prior caselaw. Since 1986, the federal courts have uniformly followed Lough -- and rejected the earlier cases on which Petitioners base their claim of confusion. Pet. at 18-22.

In Busick, the Seventh Circuit found that the Lough standard was "the formulation most compatible with the Congressional intent." 831 F.2d at 749. In Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543-44 (10th Cir. 1988), the Tenth Circuit chose "to adopt the standard propounded by the Seventh Circuit." In B.D.W. Associates v. Busy Beaver Building Centers, 865 F.2d 65, 65-66 (3d Cir. 1989), the Third Circuit adopted the Lough standard as set forth in Busick. In the instant case, the Court of Appeals agreed with the Seventh Circuit that this "objective inquiry" "best effectuates Congress'

intent," App. 73, and expressly adopted it. No Circuit Court has reached a contrary conclusion.

Petitioners assert that B.D.W. Associates "misread" the Seventh Circuit's decision in Busick, by requiring that the dispute be "substantial." Pet. at 26-27. This semantic quibble hardly rises to the level of a circuit conflict as described in this Court's Rule 10.1(a). In applying the standard, the Busick court held there was a "bona fide dispute," because debtor had raised "substantial legal questions" regarding her liability. 831 F.2d at 750. To an objective person, an "insubstantial" legal or factual dispute is not "bona fide." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (evidence not "significantly probative" will not prevent summary judgment).

Petitioners' real argument is that the Court below improperly applied the uniform Lough standard to the particular facts of this case. Pet. at 27-41. Alleged errors in applying the law to the facts do not warrant review by this Court. United States v. Johnston, 268 U.S. 220, 227 (1925).

II. The Court Below Properly Applied The Uniform Lough Standard To The Facts Of The Instant Case.

Petitioners' principal argument is that they establish a bona fide dispute merely by proving that a Missouri trial court declined to grant summary judgment against them. Pet. at 29-20; 40-41. That proposition would astound anyone familiar with the vagaries of Missouri trial practice.

Rule 74.04 of the Missouri Rules of Civil Procedure tracks the language of Rule 56 of the Federal Rules of Civil Procedure. Missouri courts, however, interpret the state rule in far more restrictive terms. Under Missouri law, summary judgment is a "drastic remedy bordering on the denial of due process." Merrick v. Southwest Electrical Co-operative, 815 S.W.2d 118, 123 (Mo. App. 1991); King General Contractors, Inc. v. Reorganized Church Of The Latter Day Saints, 821 S.W.2d 495, 499 (Mo. banc 1991). Even the "slightest doubt" about a fact warrants denial of summary judgment. Kansas City v. W.R. Grace & Co., 778 S.W.2d 264, 268 (Mo. banc 1987). In the face of these pronouncements, it is a bold trial judge indeed who

will grant summary judgment -- whether there is a bona fide dispute or not.

An objective person reviewing the facts of this case would instantly conclude that Petitioners' defenses were frivolous. Under Missouri law, the creditor banks made a prima facie case by proving that Petitioners executed the notes or guarantees in question and that a balance was due. Bank of Brookfield-Purdin v. Burns, 724 S.W.2d 262, 264 (Mo. App. 1986). As Petitioners conceded both issues, App. 30, they had the burden of proffering some plausible affirmative defense in order to present a "bona fide dispute."

Their "defense" consisted of the allegation that each of the creditor banks had "orally agreed" to "continually extend" the loans, on terms more

favorable to the borrowers, until the borrowers sold the collateral for the loans. App. 31-32. Since most banks expect to be repaid, an objective observer would regard this "defense" with more than a little skepticism. Skepticism would become outright disbelief when that observer realized, as did the courts below, that:

A. Each of the original obligors had filed for bankruptcy, and listed each of these claims as undisputed;

B. In depositions before the hearing, Mr. Rimell had admitted that there were no such "agreements";

C. There was no documentary evidence of any of these "agreements";

D. Representatives of the creditor banks vigorously denied any such "agreement"; and

E. Oral modifications to unambiguous guarantees violate Missouri's parol evidence rule.

Petitioners apparently believe that any theory supported by any testimony, no matter how frivolous, automatically creates a "bona fide dispute." That has never been the law. Bell v. Hood, 327 U.S. 678, 682-83 (1946); United States ex rel. Mayo v. Satan And His Staff, 54 F.R.D. 282 (W.D. Pa. 1971).

Petitioner's proposed defense is frivolous on its face. An objective person would conclude that any such "oral agreement" was a figment of their fertile imagination. Petitioner's recent indictment for, inter alia, defrauding each of the creditor banks and

defrauding the bankruptcy court merely confirms that conclusion.

Conclusion

For these reasons, Mark Twain Bank respectfully prays that the Court deny the Petition.

Respectfully Submitted,

HUSCH & EPPENBERGER

By:_____

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Supreme Court, U.S.
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(3)

No. 91-1584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

DID THE BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI ADOPT AND APPLY THE INCORRECT DEFINITION OF "BONA FIDE DISPUTE" AS USED IN SECTION 303 OF THE BANKRUPTCY CODE AND AS A RESULT WRONGFULLY GRANT RESPONDENTS' PETITION FOR INVOLUNTARY BANKRUPTCY?

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No. 91-1584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
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MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I. Introduction.

Congress amended Section 303 of the Bankruptcy Code in 1984 to give greater protection to debtors from the strong arm tactics of coercive creditors. This Court now is presented with an opportunity to give life to the legislative intent behind these amendments by providing a definitive interpretation of the phrase "Bona Fide Dispute" as used in Section 303.

Respondents' Brief in Opposition contains two arguments - that the Circuits agree on the proper definition of "bona fide dispute" and that the Eighth Circuit correctly applied this definition. As will be shown below, neither of these assertions is persuasive.

II. The Proper Definition of Bona Fide Dispute is an Issue Ripe for a Decision By This Court.

> "What's in a name?" - William Shakespeare, Romeo and Juliet, Act I, Scene 5, Line 35.

Numerous definitions of "bona fide dispute" have been enunciated in various jurisdictions.[1] Even among the several circuits that have professed to have adopted the standard put forth in In re Busick, 831 F. 2d 745 (7th Cir. 1987), the enunciation of what the Busick definition is varies.

The Seventh Circuit, in Busick, adopting the standard enunciated in In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986), permitted

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[1] Indeed, the reputable treatise on the law of bankruptcy, Colliers on Bankruptcy, has called for a definitive interpretation of the phrase. "Several courts formulated differing standards for determining what is a debt in a bona fide dispute. These decisions will provide other courts and practitioners with insight to the problems prior to the time that all courts of appeal or the United States Supreme Court give a definitive interpretation." 2 Colliers on Bankruptcy, para. 303.08, p. 303-39.

the bankruptcy court to determine if a dispute existed but prohibited the court from inquiring into the outcome of the dispute. Busick, 831 F.2d at 750.

The Third Circuit, in B.D.W. Associates Inc. v. Busy Beaver Building Centers, Inc., 865 F. 2d 65, 66-67 (3rd Cir. 1989), professed to have adopted the "Busick" definition, yet it required a debtor to raise substantial factual and legal questions to preclude an involuntary bankruptcy.

Now, the Eighth Circuit, also professing to have adopted the Busick standard, has stated that the bankruptcy court may address the legal merits of the dispute and assess the credibility of witnesses to determine the factual merits of the dispute. In re Rimell, 946 F.2d 1363, 1365 (8th Cir. 1991); App. to Pet. at A-74. This standard is in complete contradiction with the standard enunciated in Busick. The Eighth Circuit's standard, whet-

her it be called the "Busick" standard or not, calls for an assessment of the merits of the dispute, not merely whether a bona fide dispute exists.

All three of the aforementioned courts call their definition of "bona fide dispute" the "Busick" standard, but each of their definitions of the "Busick" standard is clearly different. You can call it a duck, but if it wags its tail and barks, it's not a duck.

III. The Eight Circuit Has Adopted and the Bankruptcy Court Applied an Improper Standard for Determining Whether a Bona Fide Dispute Exists.

The Eighth Circuit in this case has adopted a definition of "bona fide dispute" that allows the trial court to examine the merits of an alleged debtor's defense to a debt. This includes allowing the trial court to assess "witnesses' credibilities and other

factual considerations."[2] Rimell, 946 F.2d 1365; App. to Pet. at A-74.

The Bankruptcy Court below, did just that when it apparently doubted Mr. Rimell's testimony and other evidence and determined

---

[2] Respondents' apparently believe that witness credibility is an issue as they point to Petitioners' recent indictment as if it proved their case. This information is, of course, irrelevant, highly prejudicial, inadmissible and not in the record below. In return, Petitioners might point out that there is presently before the District Court for the Eastern District of Missouri a Motion to Quash this indictment based on the U.S. Attorney's alleged misconduct. Recently, several St. Louis newspapers have published articles pointing out that the U.S. Attorney for the Eastern District of Missouri whose department has instituted the prosecution against Petitioners was a lead player in instituting the present involuntary bankruptcy when he was a partner with present counsel for Respondent Mark Twain Bank. These media reports indicate that the U.S. Attorney has been accused of instigating the federal prosecution against Petitioners because of a personal vendetta he has against them arising out of the present bankruptcy situation. Could Senator Baccus have understood the lengths to which some creditors are willing to go to harass a debtor? Could this be why he proposed his amendments to Section 303 of the Bankruptcy Code?

that the evidence presented did not "prove . . . the existence of an agreement to renew or modify the terms of the loans. . . ." App. to Pet. at A-50 - A-51. The court thus resolved Petitioners' bona fide dispute.

Respondents contend that the Bankruptcy Court below applied the proper definition of "bona fide dispute" to the facts of this case. They dismiss alleged debtors' defenses on the debts as "frivolous," suggesting that an "objective person would conclude that any . . . 'oral agreement' to extend the terms of the loans was a figment of the [Petitioners'] fertile imaginations [sic]." Respondents' Brief in Opposition at 11. Yet, Respondents could not convince seemingly "objective" state judges to grant them summary judgment on these debts.

Respondents attempt to blame their inability to obtain summary judgment on the "vagaries of Missouri trial practice." Resp-

ondents' Brief in Opposition at 7. The fact is that the standard for summary judgment in Missouri is the same as that in federal court and the same as that in probably every other state in the union. The moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 74.04, Missouri Rules of Civil Procedure.

This is the same standard that was utilized by the District of Colorado, in In re Stroop, 51 B.R. 210 (D. Col. 1985), to determine if a bona fide dispute existed. This is the same standard that the Eastern District of Michigan, in Lough, found to be too hard on the debtor. Thus, the court in Lough modified the Stroop standard in the debtor's favor. The Bankruptcy Court below and the Eighth Circuit have professed to have adopted the Lough standard. Thus, they have adopted

a standard easier for the debtor to pass than the summary judgment test. It follows direct logic then that since Petitioners passed the summary judgment test in state court several times they easily should have passed the bona fide dispute test in bankruptcy court.

IV. Misstatements of Fact in Respondents' Brief in Opposition to Petition for Writ of Certiorari.

Respondents' Brief in Opposition contains several factual inaccuracies which require a response.

1. Contrary to Respondents' implications, Mr. and Mrs. Rimell never filed for bankruptcy. See Respondents' Brief in Opposition at 10. They were forced into involuntary bankruptcy by Respondents.

2. Contrary to Respondents' assertion, Mr. Rimell has never stated, in deposition or elsewhere, that there were no agreements with the creditor banks to extend the terms of the

loans. See Respondents' Brief in Opposition at 10.

3. Contrary to Respondents' assertion, documentary evidence was presented to the Bankruptcy Court regarding the existence of these agreements. See, Respondents' Brief in Opposition at 10; App. to Pet. at A-50.

4. Contrary to Respondents' assertion, oral modifications of unambiguous guarantees do not violate Missouri's parol evidence rule. See, Respondents' Brief in Opposition at 11. It is textbook law that the parol evidence rule precludes the introduction of statements made prior to or contemporaneously with the execution of a complete written contract to vary the terms of such contract. Sol Abrahams & Son Construction Co. v. Osterholm, 136 S.W.2d 86 (Mo. Ct. App. 1940). Petitioners' defense on the loans is that Respondent banks modified the terms of the loans. The parol

evidence rule has nothing to do with modifications of contracts.

V. Conclusion.

For these various reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted, and this case be set for argument to determine if this Court should reverse the Bankruptcy Court's decision.

Respectfully submitted,

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